

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

PAUL WILLIAM PILGER,

Plaintiff(s),

v.

BANK OF AMERICA, N.A., et al.,

Defendant(s).

Case No. 2:15-CV-1833 JCM (NJK)

ORDER

Presently before the court is defendants National Default Servicing Corp. and Bank of America, N.A.'s ("BANA") motion to dismiss. (ECF No. 6). *Pro se* plaintiff Paul Pilger responded to the motion (ECF No. 10) and filed a motion to remand. (ECF No. 9). Defendants filed a reply and response. (ECF Nos. 11, 12).

I. Background

a. Factual history

This is a mortgage foreclosure lawsuit. Plaintiff is a Nevada resident. (ECF No. 4). In 2007, plaintiff obtained title to the property at 10410 Badger Ravine St., Las Vegas, NV 89178. (ECF No. 6-1). BANA loaned plaintiff \$199,490.50 to purchase the property. (ECF No. 4). BANA is headquartered and incorporated in North Carolina. (ECF Nos. 12 at 1, 8). The loan is secured by a first position deed of trust. (*Id.*) BANA later substituted National Default Servicing Corporation ("NDSC") as trustee for the loan. (ECF No. 6). NDSC is headquartered and incorporated in Arizona. (ECF No. 12 at 2).

Plaintiff defaulted on his loan in November 2009. (ECF No. 4 at 4). As a result, NDSC recorded a notice of default and election to sell. (ECF No. 6-3). Plaintiff petitioned for mediation pursuant to NRS 107.086 and foreclosure mediation rule 5(4)(a). (ECF No. 4).

1 The mediation was held on December 6, 2010. (ECF No. 1-7). After reviewing plaintiff's
 2 financial obligations and income, the mediator determined plaintiff did not qualify for a loan
 3 modification. (*Id.*). NDSC recorded the foreclosure mediation certificate and notice of trustee's
 4 sale. (ECF No. 6. at 6-4, 6-5).

5 b. *Procedural history*

6 Plaintiff filed a petition for judicial review of the mediation in Nevada state court. (ECF
 7 No. 18). The District Court denied the petition after a hearing, and directed the foreclosure to
 8 proceed. (ECF No. 1-9). Plaintiff then filed a notice of appeal with the Nevada Supreme Court.
 9 (ECF No. 1-10). The Nevada Supreme Court affirmed the lower court's decision. (*Id.*)

10 After the Nevada Supreme Court's affirmance, plaintiff filed a new complaint alleging
 11 wrongful foreclosure against the defendants. (ECF No. 17-15.). Defendant removed the action to
 12 this court. (*Id.*).

13 Plaintiff argues for three forms of relief based on a variety of claims: (1) that the court issue
 14 an injunction to stay BANA's foreclosure until defendant produces a valid promissory note, (2)
 15 that multiple signees to various transactional documents be brought forth to testify to the credibility
 16 of their signatures, and (3) a declaration that BANA violated NRS 107.080.

17 **II. Legal Standard**

18 a. *Motion to remand*

19 Under 28 U.S.C. § 1441, "any civil action brought in a [s]tate court of which the district
 20 courts of the United States have original jurisdiction, may be removed by the defendant or the
 21 defendants, to the district court of the United States for the district and division embracing the
 22 place where such action is pending." 28 U.S.C. § 1441(a).

23 Removal of a case to a United States district court may be challenged by motion. 28 U.S.C.
 24 § 1441(c). A federal court must remand a matter if there is a lack of jurisdiction. *See Knutson v.*
 25 *Allis-Chalmers Corp.*, 358 F. Supp. 2d 983, 988 (D. Nev. 2005). Removal statutes are construed
 26 restrictively and in favor of remanding a case to state court. *See Shamrock Oil & Gas Corp. v.*
 27 *Sheets*, 313 U.S. 100, 108–9 (1941); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). "On a
 28 motion to remand, the removing defendant faces a strong presumption against removal, and bears

1 the burden of establishing that removal was proper by a preponderance of evidence.” *Knutson* 358
 2 F. Supp. 2d at 988 (citing *Gaus*, 980 F.2d at 567; *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d
 3 398, 403-04 (9th Cir. 1996)).

4 An action filed in state court may be removed to federal court only if the federal court
 5 would have had original subject matter jurisdiction over the action. 28 U.S.C. § 1441(a). This court
 6 has original subject matter jurisdiction over two types of cases. First, pursuant to 28 U.S.C. § 1331,
 7 this court has federal question jurisdiction over “all civil actions arising under the Constitution,
 8 laws, or treaties of the United States.” Second, pursuant to its diversity jurisdiction, the court may
 9 preside over suits between citizens of different states where the amount in controversy exceeds the
 10 sum or value of \$75,000. 28 U.S.C. § 1332(a).

11 For proper removal under the federal question theory, the complaint usually must state the
 12 federal question *on its face*. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (the federal
 13 question must be clear from the face of plaintiff’s complaint in order for the court to have
 14 jurisdiction under 28 U.S.C. § 1331). However, a state created cause of action may be deemed to
 15 arise under federal law where: (1) the federal law completely preempts state law; (2) the claim is
 16 necessarily federal in character; or (3) the right to relief depends on the resolution of a substantial,
 17 disputed federal question. See *Fitzgerald v. Celergy Networks, Inc.*, 67 Fed. Appx. 390, 391–92
 18 (9th Cir. 2003).

19 b. *Motion to dismiss*

20 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
 21 can be granted.” Fed.R.Civ.P. 12(b)(6). A properly pled complaint must provide “[a] short and
 22 plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2);
 23 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While rule 8 does not require detailed
 24 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
 25 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

26 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
 27 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter
 28 to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation omitted).

1 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 2 when considering motions to dismiss. First, the court must accept as true all well-pled factual
 3 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
 4 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory
 5 statements, do not suffice. *Id.*

6 Second, the court must consider whether the factual allegations in the complaint allege a
 7 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint
 8 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the
 9 alleged misconduct. *Id.* at 678.

10 Where the complaint does not permit the court to infer more than the mere possibility of
 11 misconduct, the complaint has “alleged—but it has not shown—that the pleader is entitled to
 12 relief.” *Id.* at 679 (internal quotations omitted). When the allegations in a complaint have not
 13 crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550
 14 U.S. at 570.

15 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
 16 1216 (9th Cir. 2011). The *Starr* court stated,

17 First, to be entitled to the presumption of truth, allegations in a complaint or
 18 counterclaim may not simply recite the elements of a cause of action, but must
 19 contain sufficient allegations of underlying facts to give fair notice and to enable
 20 the opposing party to defend itself effectively. Second, the factual allegations that
 are taken as true must plausibly suggest an entitlement to relief, such that it is not
 unfair to require the opposing party to be subjected to the expense of discovery and
 continued litigation.

21 *Id.*

22 **III. Discussion**

23 *a. Motion to remand*

24 Plaintiff moves to remand to state court because Nevada (1) has a compelling interest in
 25 adjudicating the merits of the case, and (2) the issue is governed by state law. (ECF No. 9).
 26 Defendant responds (1) that the court has subject matter jurisdiction, and thus (2) the court should
 27 not abstain from exercising it unless there is an exceptional circumstance. (ECF No. 12). Plaintiff
 28 does not claim that there is an exceptional circumstance. (*Id.*).

1 Plaintiff concedes that this court has diversity jurisdiction. (ECF No. 9). Defendants are
 2 not residents of Nevada for diversity purposes, while plaintiff is. (*Id.* at 16, 17). Plaintiff further
 3 acknowledges that the amount in controversy is satisfied because the value of both the property
 4 and defaulted loan exceeds \$75,000. (*Id.* at 27). Thus, defendant has established that removal was
 5 proper. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996).

6 *b. Motion to dismiss*

7 Defendant argues that the complaint should be dismissed because (1) collateral estoppel
 8 precludes plaintiff’s “produce the note” theory, (2) there is no statutory violation, and (3) the
 9 damages are premature. (ECF No. 6). Plaintiff argues collateral estoppel does not preclude his
 10 claim because (1) there was no valid judgment, (2) there are numerous statutory violations, and
 11 (3) he is entitled to note production. (ECF No. 10 at 24).

12 The court turns to the collateral estoppel claim first. Federal courts must give preclusive
 13 effect to state court judgments on questions of fact or law when a state court judgement would be
 14 binding to the state. *Allen v. McCurry*, 449 U.S. 90, 95 (1980). Judgments of administrative bodies
 15 that have attained finality are also collaterally estopped from readjudication. *Astoria Federal Sav.*
 16 *and Loan Ass’n v. Solimino*, 501 U.S. 104, 107 (1991). The purpose of this rule is to promote
 17 comity between state and federal courts while avoiding re-litigation. *Id.* at 96.

18 Three elements must be met to bar a claim under collateral estoppel, (1) the issue at stake
 19 must be identical to one alleged in prior litigation, (2) the issue must have been actually litigated,
 20 and (3) the determination of the issue in the prior litigation must have been a critical and necessary
 21 part of the judgment. *Town of North Bonneville v. Callaway*, 10 F.3d 1505 (9th Cir. 1993).

22 Plaintiff’s request for production of an original promissory note is the issue at stake in all
 23 claims. He argues that his request for BANA’s original note was not decided in the prior case. The
 24 court disagrees. The Nevada Supreme Court affirmed the state district court finding that BANA
 25 “had produced all required documents and mediated in good faith” (ECF No. 17-7 at 2). The
 26 Supreme Court found that BANA “produced certified copies of the note and deed of trust [which]
 27 establish [BANA] as both the original and current holder and beneficiary of the note and deed of
 28 trust, respectively.” *Id.* at 3. Central to the courts judgment was a rejection of “Pilger’s assertion

1 that the district court erred in accepting [BANA]'s production as complete and adequate. . . ." *Id.*
2 at 4-5

3 **IV. Conclusion**

4 Plaintiffs request for remand is denied because this court has diversity jurisdiction. Further,
5 plaintiff's complaint is dismissed because his claims are barred by collateral estoppel. The court
6 will not allow plaintiff to re-litigate the promissory note issue. Plaintiff's claims under Nevada
7 statutes also rely on the same issue decided by the state court. Therefore, defendant's motion to
8 dismiss is granted, and plaintiff's complaint is dismissed with prejudice.

9 Accordingly,

10 IT IS HEREBY ORDERED, AJUDGED, AND DECREED that Bank of America, North
11 America's motion to dismiss (ECF No. 6) be, and the same hereby is, GRANTED.

12 IT IS FURTHER ORDERED that Paul Pilger's motion to remand (ECF No. 9) be, and the
13 same hereby is, DENIED.

14 IT IS FURTHER ORDERED that the complaint in this matter (ECF No. 1-2) be, and the
15 same hereby is, DISMISSED with prejudice.

16 The clerk shall enter judgment accordingly and close the case.

17 DATED July 1, 2016.

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19 UNITED STATES DISTRICT JUDGE
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